

employer member's allocation is equal to 30 allocated ratably among all members of the applicable large employer on the basis of the number of full-time employees employed by each applicable large employer member during the calendar month (after application of the rules of paragraph (d) of this section addressing employees who work for more than one applicable large employer member during a calendar month). If an applicable large employer member's total allocation is not a whole number, the allocation is rounded to the next highest whole number. This rounding rule may result in the aggregate reduction for the entire group of applicable large employer members exceeding 30.

(f) *Example.* The following example illustrates the provisions of paragraphs (a) and (e) of this section.

*Example.* (i) *Facts.* Applicable large employer member Z and applicable large employer member Y are the two members of an applicable large employer. Applicable large employer member Z employs 40 full-time employees in each calendar month of 2017. Applicable large employer member Y employs 35 full-time employees in each calendar month of 2017. Assume that for 2017, the applicable payment amount for a calendar month is \$2,000 divided by 12. Applicable large employer member Z does not sponsor an eligible employer-sponsored plan for any calendar month of 2017, and receives a Section 1411 Certification for 2017 with respect to at least one of its full-time employees. Applicable large employer member Y sponsors an eligible employer-sponsored plan under which all of its full-time employees are eligible for minimum essential coverage.

(ii) *Conclusion.* Pursuant to section 4980H(a) and this section, applicable large employer member Z is subject to an assessable payment under section 4980H(a) for 2017 of \$48,000, which is equal to  $24 \times \$2,000$  (40 full-time employees reduced by 16 (its allocable share of the 30-employee offset ( $(40/75) \times 30 = 16$ )) and then multiplied by \$2,000). Applicable large employer member Y is not subject to an assessable payment under section 4980H(a) for 2017.

(g) *Additional guidance.* With respect to assessable payments under section 4980H(a), the Commissioner may prescribe additional guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter).

(h) *Effective/applicability date.* This section is applicable for periods after December 31, 2014.

[T.D. 9655, 79 FR 8577, Feb. 12, 2014]

#### § 54.4980H-5 Assessable payments under section 4980H(b).

(a) *In general.* If an applicable large employer member offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any calendar month (including an offer of coverage to all but five percent or less (or, if greater, five or less) of its full-time employees (provided that an employee is treated as having been offered coverage only if the employer also offers coverage to that employee's dependents)) and the applicable large employer member has received a Section 1411 Certification with respect to one or more full-time employees of the applicable large employer member, then there is imposed on the applicable large employer member an assessable payment equal to the product of the number of full-time employees of the applicable large employer member for which it has received a Section 1411 Certification (minus the number of those employees in a limited non-assessment period for certain employees and the number of other employees who were offered the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that satisfied minimum value and met one or more of the affordability safe harbors described in paragraph (e) of this section) and the section 4980H(b) applicable payment amount. Notwithstanding the foregoing, the aggregate amount of assessable payment determined under this paragraph (a) with respect to all employees of an applicable large employer member for any calendar month may not exceed the product of the section 4980H(a) applicable payment amount and the number of full-time employees of the applicable large employer member during that calendar month (reduced by the applicable large employer member's ratable allocation of the 30 employee reduction under § 54.4980H-4(e)).

(b) *Offer of coverage.* For purposes of this section, the same rules with respect to an offer of coverage for purposes of section 4980H(a) apply. See § 54.4980H-4.

(c) *Partial calendar month.* If an applicable large employer member fails to offer coverage to a full-time employee for any day of a calendar month, that employee is treated as not offered coverage during that entire month, regardless of whether the employer uses the payroll period rule set forth in § 54.4980H-3(d)(1)(ii) or the weekly rule set forth in § 54.4980H-3(c)(3) to determine full-time employee status for the calendar month. However, in a calendar month in which a full-time employee's employment terminates, if the employee would have been offered coverage if the employee had been employed for the entire month, the employee is treated as having been offered coverage during that month. Also, an applicable large employer member is not subject to an assessable payment under section 4980H with respect to an employee for the calendar month in which the employee's start date occurs if the start date is on a date other than the first day of the calendar month.

(d) *Applicability to applicable large employer member.* The liability for an assessable payment under section 4980H(b) for a calendar month with respect to a full-time employee applies solely to the applicable large employer member that was the employer of that employee for that calendar month. For an employee who was a full-time employee of more than one applicable large employer member during that calendar month, the liability for the assessable payment under section 4980H(b) for a calendar month applies to the applicable large employer member for whom the employee has the greatest number of hours of service for that calendar month (if the employee has an equal number of hours of service for two or more applicable large employer members for the calendar month, those applicable large employer members can treat one of those members as the employer of that employee for that calendar month for purposes of this paragraph (d), and if the members do not select one member, or select in an inconsistent manner, the IRS will

select a member to be treated as the employer of that employee for purposes of the assessable payment determination). For a calendar month, an applicable large employer member may be liable for an assessable payment under section 4980H(a) or under section 4980H(b), but will not be liable for an assessable payment under both section 4980H(a) and section 4980H(b).

(e) *Affordability*—(1) *In general.* An employee who is offered coverage by an applicable large employer member may be eligible for an applicable premium tax credit or cost-sharing reduction if that offer of coverage is not affordable within the meaning of section 36B(c)(2)(C)(i) and the regulations thereunder.

(2) *Affordability safe harbors for section 4980H(b) purposes.* The affordability safe harbors set forth in paragraph (e)(2)(ii) through (iv) of this section apply solely for purposes of section 4980H(b), so that an applicable large employer member that offers minimum essential coverage providing minimum value will not be subject to an assessable payment under section 4980H(b) with respect to any employee receiving the applicable premium tax credit or cost-sharing reduction for a period for which the coverage is determined to be affordable under the requirements of an affordability safe harbor. This rule applies even if the applicable large employer member's offer of coverage that meets the requirements of an affordability safe harbor is not affordable for a particular employee under section 36B(c)(2)(C)(i) and an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to that employee.

(i) *Conditions of using an affordability safe harbor.* An applicable large employer member may use one or more of the affordability safe harbors described in this paragraph (e)(2) only if the employer offers its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that provides minimum value with respect to the self-only coverage offered to the employee. Use of any of the safe harbors is optional for an applicable large employer member,

and an applicable large employer member may choose to apply the safe harbors for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category. Reasonable categories generally include specified job categories, nature of compensation (hourly or salary), geographic location, and similar bona fide business criteria. An enumeration of employees by name or other specific criteria having substantially the same effect as an enumeration by name is not considered a reasonable category.

(ii) *Form W-2 safe harbor*—(A) *Full-year offer of coverage*. An employer will not be subject to an assessable payment under section 4980H(b) with respect to a full-time employee if that employee's required contribution for the calendar year for the employer's lowest cost self-only coverage that provides minimum value during the entire calendar year (excluding COBRA or other continuation coverage except with respect to an active employee eligible for continuation coverage) does not exceed 9.5 percent of that employee's Form W-2 wages from the employer (and any other member of the same applicable large employer that also pays wages to that employee) for the calendar year. Application of this safe harbor is determined after the end of the calendar year and on an employee-by-employee basis, taking into account the Form W-2 wages and the required employee contribution for that year. In addition, to qualify for this safe harbor, the employee's required contribution must remain a consistent amount or percentage of all Form W-2 wages during the calendar year (or during the plan year for plans with non-calendar year plan years) so that an applicable large employer member is not permitted to make discretionary adjustments to the required employee contribution for a pay period. A periodic contribution that is based on a consistent percentage of all Form W-2 wages may be subject to a dollar limit specified by the employer.

(B) *Adjustment for partial-year offer of coverage*. For an employee not offered coverage for an entire calendar year, the Form W-2 safe harbor is applied by adjusting the Form W-2 wages to re-

flect the period for which coverage was offered, then determining whether the employee's required contribution for the employer's lowest cost self-only coverage that provides minimum value, totaled for the periods during which coverage was offered, does not exceed 9.5 percent of the adjusted amount of Form W-2 wages. To adjust Form W-2 wages for this purpose, the Form W-2 wages are multiplied by a fraction equal to the number of calendar months for which coverage was offered over the number of calendar months in the employee's period of employment with the employer during the calendar year. For this purpose, if coverage is offered during at least one day during the calendar month, or the employee is employed for at least one day during the calendar month, the entire calendar month is counted in determining the applicable fraction.

(iii) *Rate of pay safe harbor*. An applicable large employer member satisfies the rate of pay safe harbor with respect to an hourly employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of an amount equal to 130 hours multiplied by the lower of the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year) or the employee's lowest hourly rate of pay during the calendar month. An applicable large employer member satisfies the rate of pay safe harbor with respect to a non-hourly employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of the employee's monthly salary, as of the first day of the coverage period (instead of 130 multiplied by the hourly rate of pay); provided that if the monthly salary is reduced, including due to a reduction in work hours, the safe harbor is not available, and, solely for purposes of this paragraph (e)(2)(iii), an applicable large employer member may

use any reasonable method for converting payroll periods to monthly salary. For this purpose, if coverage is offered during at least one day during the calendar month, the entire calendar month is counted both for purposes of determining the assumed income for the calendar month and for determining the employee's share of the premium for the calendar month.

(iv) *Federal poverty line safe harbor.* An applicable large employer member satisfies the federal poverty line safe harbor with respect to an employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year, divided by 12. For this purpose, if coverage is offered during at least one day during the calendar month, the entire calendar month is counted both for purposes of determining the monthly amount for the calendar month and for determining the employee's share of the premium for the calendar month. For this purpose, the applicable federal poverty line is the federal poverty line for the State in which the employee is employed.

(v) *Examples.* The following examples illustrate the application of the affordability safe harbors described in this paragraph (e)(2). In each example, each employer is an applicable large employer member with 200 full-time employees (including full-time equivalent employees).

*Example 1 (Form W-2 wages safe harbor).* (i) *Facts.* Employee A is employed by Employer Z consistently from January 1, 2015, through December 31, 2015. In addition, Employer Z offers Employee A and his dependents minimum essential coverage during that period that provides minimum value. The employee contribution for self-only coverage is \$100 per calendar month, or \$1,200 for the calendar year. For 2015, Employee A's Form W-2 wages with respect to employment with Employer Z are \$24,000.

(ii) *Conclusion.* Because the employee contribution for 2015 is less than 9.5 percent of Employee A's Form W-2 wages for 2015, the coverage offered is treated as affordable with respect to Employee A for 2015 (\$1,200 is 5 percent of \$24,000).

*Example 2 (Form W-2 wages safe harbor).* (i) *Facts.* Employee B is employed by Employer Y from January 1, 2015, through September 30, 2015. In addition, Employer Y offers Employee B and his dependents minimum essential coverage during that period that provides minimum value. The employee contribution for self-only coverage is \$100 per calendar month, or \$900 for Employee B's period of employment. For 2015, Employee B's Form W-2 wages with respect to employment with Employer Y are \$18,000. For purposes of applying the affordability safe harbor, the Form W-2 wages are multiplied by 9/9 (9 calendar months of coverage offered over 9 months of employment during the calendar year) or 1. Accordingly, affordability is determined by comparing the adjusted Form W-2 wages (\$18,000) to the employee contribution for the period for which coverage was offered (\$900).

(ii) *Conclusion.* Because the employee contribution for 2015 is less than 9.5 percent of Employee B's adjusted Form W-2 wages for 2015, the coverage offered is treated as affordable with respect to Employee B for 2015 (\$900 is 5 percent of \$18,000).

*Example 3 (Form W-2 wages safe harbor).* (i) *Facts.* Employee C is employed by Employer X from May 15, 2015, through December 31, 2015. In addition, Employer X offers Employee C and her dependents minimum essential coverage during the period from August 1, 2015, through December 31, 2015, that provides minimum value. The employee contribution for self-only coverage is \$100 per calendar month, or \$500 for Employee C's period of employment. For 2015, Employee C's Form W-2 wages with respect to employment with Employer X are \$15,000. For purposes of applying the affordability safe harbor, the Form W-2 wages are multiplied by 5/8 (5 calendar months of coverage offered over 8 months of employment during the calendar year). Accordingly, affordability is determined by comparing the adjusted Form W-2 wages (\$9,375 or \$15,000 x 5/8) to the employee contribution for the period for which coverage was offered (\$500).

(ii) *Conclusion.* Because the employee contribution of \$500 is less than 9.5 percent of \$9,375 (Employee C's adjusted Form W-2 wages for 2015), the coverage offered is treated as affordable with respect to Employee C for 2015 (\$500 is 5.33 percent of \$9,375).

*Example 4 (Rate of pay safe harbor).* (i) *Facts.* Employer W offers its full-time employees and their dependents minimum essential coverage that provides minimum value. For the 2016 calendar year, Employer W is using the rate of pay safe harbor to establish premium contribution amounts for full-time employees paid at a rate of \$7.25 per hour (the minimum wage in Employer W's jurisdiction) for each calendar month of the entire 2016 calendar year. Employer W can apply the affordability safe harbor by using

an assumed monthly income amount that is based on an assumed 130 hours of service multiplied by \$7.25 per hour (\$942.50 per calendar month). To satisfy the safe harbor, Employer W would set the employee monthly contribution amount at a rate that does not exceed 9.5 percent of the assumed monthly income of \$942.50. Employer W sets the employee contribution for self-only coverage at \$85 per calendar month for 2016.

(ii) *Conclusion*. Because \$85 is less than 9.5 percent of the employee's assumed monthly income at a \$7.25 rate of pay, the coverage offered is treated as affordable under the rate of pay safe harbor for each calendar month of 2016 (\$85 is 9.01 percent of \$942.50).

*Example 5 (Rate of pay safe harbor).* (i) *Facts*. Employee E is employed by Employer V from May 1, 2015, through December 31, 2015. Employer V offers Employee E and her dependents minimum essential coverage from May 1, 2015, through December 31, 2015, that provides minimum value. The employee contribution for self-only coverage is \$100 per calendar month. From May 1, 2015, through October 31, 2015, Employee E is paid at a rate of \$10 per hour. From November 1, 2015, through December 31, 2015, Employee E is paid at a rate of \$12 per hour. For purposes of applying the affordability safe harbor for the calendar months May 2015 through October 2015, Employer V may assume that Employee E earned \$1,300 per calendar month (130 hours of service multiplied by \$10 (which is the lower of the employee's hourly rate of pay at the beginning of the coverage period (\$10) and the lowest hourly rate of pay for the calendar month (\$10)). Accordingly, affordability is determined by comparing the assumed income (\$1,300 per month) to the employee contribution (\$100 per calendar month). For the calendar months November 2015 through December 2015, Employer V may assume that Employee E earned \$1,300 per calendar month (130 hours of service multiplied by \$10 (which is the lower of the employee's hourly rate of pay at the beginning of the coverage period (\$10) and the lowest hourly rate of pay for the calendar month (\$12)). Accordingly, affordability is determined by comparing the assumed income (\$1,300 per month) to the employee contribution (\$100 per calendar month).

(ii) *Conclusion*. Because \$100 is less than 9.5 percent of Employee E's assumed monthly income for each calendar month from May 2015 through December 2015, the coverage offered is treated as affordable with respect to Employee E for May 2015 through December 2015 (\$100 is 7.69 percent of \$1,300).

*Example 6 (Federal poverty line safe harbor).*

(i) *Facts*. Employee F is employed by Employer T from January 1, 2015, through December 31, 2015. In addition, Employer T offers Employee F and his dependents minimum essential coverage during that period that provides minimum value. Employer T

uses the look-back measurement method. Under that measurement method as applied by Employer T, Employee F is treated as a full-time employee for the entire calendar year 2015. Employee F is regularly credited with 35 hours of service per week but is credited with only 20 hours of service during the month of March 2015 and only 15 hours of service during the month of August 2015. Assume for this purpose that the federal poverty line for 2015 for an individual is \$11,670. With respect to Employee F, Employer T sets the monthly employee contribution for employee single-only coverage for each calendar month of 2015 at \$92.39 (9.5 percent of \$11,670, divided by 12).

(ii) *Conclusion*. Regardless of Employee F's actual wages for any calendar month in 2015, including the months of March 2015 and August 2015, when Employee F has lower wages because of significantly lower hours of service, the coverage under the plan is treated as affordable with respect to Employee F, because the employee contribution does not exceed 9.5 percent of the federal poverty line.

(f) *Additional guidance*. With respect to assessable payments under section 4980H(b), including the determination of whether an offer of coverage is affordable for purposes of section 4980H, the Commissioner may prescribe additional guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter).

(g) *Effective/applicability date*. This section is applicable for periods after December 31, 2014.

[T.D. 9655, 79 FR 8577, Feb. 12, 2014]

#### § 54.4980H-6 Administration and procedure.

(a) *In general*. [Reserved]

(b) *Effective/applicability date*. This section is applicable for periods after December 31, 2014.

[T.D. 9655, 79 FR 8577, Feb. 12, 2014]

#### § 54.4981A-1T Tax on excess distributions and excess accumulations (temporary).

The following questions and answers relate to the tax on excess distributions and excess accumulations under section 4981A of the Internal Revenue Code of 1986, as added by section 1133 of the Tax Reform Act of 1986 (Pub. L. 99-514) (TRA '86).